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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926. No.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

VS.

THE TOWN OF MORRISTOWN, HENRY LADEN and others,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Delaware, Lackawanna and Western Railroad Company respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled action.

Statement of the Case.

The action was begun on October 30, 1924, in the District Court of the United States for the District of New Jersey by The Delaware, Lackawanna and Western Railroad Company, a railroad corporation of the Commonwealth of Pennsylvania and a common carrier of passengers, against the Town of Morristown, a municipal corporation of the State of New Jersey, and sixteen individual defendants, licensed taxicab owners and drivers of the Town. The relief sought was a decree enjoining the Town of Morristown from enforcing a municipal ordinance which established a public hack stand on the complainant's station grounds at Morristown, New Jersey, and prohibited the use of other parts of the station grounds by private cars or taxicabs (Record, p. 29), and enjoining the individual defendants from entering upon and using complainant's station grounds as a public hack stand.

Petitioner operates as lessee in perpetuity the railroad of The Morris and Essex Railroad Company. The lessor Company owns in fee simple and the petitioner as lessee occupies and uses as a common carrier of passengers the passenger station and station grounds at Morristown, New Jersey, hereinbefore mentioned (Record, pp. 358-359). It has not at any time dedicated these station grounds to public use or conveyed any interest therein to the defendant municipality.

In the year 1922 from 20 to 25 of the licensed taxicab drivers of the Town customarily drove into the station grounds in the evening to meet passengers coming from

New York (Record, p. 127). Competition between these men created conditions of noise and turmoil which the Railroad Company attempted to eliminate by granting an exclusive privilege of parking taxicabs and soliciting patronage on its premises to a single operator, Welsh, under regulations prescribed by the Railroad Company (Record, p. 22). The municipal authorities characterizing this action by the Railroad Company as creating a monopoly, and as unjust to the public hack men in depriving them of their livelihood (Record, pp. 114, 135) adopted an ordinance forbidding *all* taxicabmen from using the station grounds, thus preventing the Railroad Company's contractor from performing his contract. Welsh challenged the validity of that ordinance in the State Court, unsuccessfully (Record, p. 100), and upon the termination of that litigation, on October 22, 1924, the municipality adopted the ordinance here in question, providing among other things (Record, p. 28):

> *Section* 1. That part of the westerly side of the driveway on the east side of the shelter house of the Delaware, Lackawanna and Western Railroad in Morristown * * * is hereby designated and established as an additional public hack stand.
>
> *Section* 2. No automobile or other vehicle either private or that which may be engaged in the transportation of passengers for hire, shall be parked or allowed to stand for a longer period than is necessary to take on or let off passengers, expressage or baggage * * *.
>
> *Section* 3. No automobile or other vehicle which may be engaged in the transportation of passengers

for hire shall be parked or allowed to stand along the curb or enclosed part of the easterly side of said driveway.

Purporting to act upon the authority of this ordinance, 16 or more taxicab owners and drivers entered the petitioner's station grounds and parked their cabs in the area specified in the ordinance, stood upon an adjacent platform and solicited the patronage of persons who had arrived on petitioner's trains and were walking toward the nearest public highway (Record, p. 137). Thereupon petitioner filed its bill in the District Court, alleging the invalidity of the ordinance as a taking of the Railroad Company's property for municipal purposes without compensation, and depriving the petitioner of its property, and the use and control thereof without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution (Record, p. 4). The defense (Record, pp. 34, 40) was, first, that the Railroad Company held its station grounds subject to regulation by municipal authority, and the convenience of the traveling public in having a public hack stand on the Railroad's premises was a sufficient ground for the exercise of the municipal power; and secondly, that the ordinance constituted a mere traffic regulation which the municipality had a right to enact and enforce by reason of a contract entered into between the Railroad Company and the Town in the year 1912. That contract (Record, p. 308), which dealt primarily with the subject of eliminating grade crossings, contained certain provisions relating to the construction of a new passenger station and approaches thereto. One of these provisions

(Record, p. 316) was to the effect that the Railroad Company would provide and construct an L-shaped driveway running through its station grounds from a public street called Morris Street to another street called Lackawanna Place (see Map—Record, p. 21). After describing said driveway the contract provided (Record, p. 316):

> "This contract shall not be construed as a dedication of said driveway as a public highway."

The contract also provided (Record, p. 317) as follows:

> "It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and for the enforcement of the rules and regulations of the Railroad Companies in respect thereto."

The District Court, after hearing, sustained the bill and on the 17th day of July, 1925, a decree was entered granting the prayers of the bill (Record, p. 56) enjoining the Town from establishing a hack stand and enjoining the individual defendants from using complainant's land for such purpose. The opinion of Bodine, *J.*, of the District Court is printed on page 47 of the Record. On appeal by the respondents to the Circuit Court of Appeals for the Third Circuit that Court on March 26, 1926, filed its decree reversing the judgment of the District Court and directing the dismissal of the bill of complaint (Record, p. 374). Judge Davis, with whom Judge Woolley

concurred, wrote the opinion (Record, p. 365). Judge Buffington filed a dissenting opinion (Record, p. 372).

The majority held that the lands of the Railroad Company were as matter of general law, not of a private nature but of such a public nature that a municipality could lawfully establish a public hack stand thereon as a matter of public convenience and in the interest of public welfare; that notwithstanding the agreement between the Town and the Railroad Company that said driveway should not be deemed a public way, the covenant authorizing the Town to exercise all necessary police power at the station for the regulation of traffic "and the enforcement of the rules and regulations of the Railroad Company with respect thereto" gave the municipality plenary authority to establish a public hack stand in the station yard even against the expressed objection of the Railroad Company.

Your petitioner immediately filed a motion for a rehearing in said cause (Record, p. 375), which was denied without memorandum on September 3, 1926 (Record, p. 392). This petition is filed under Section 240(*a*) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

1. Did Section 1 of the municipal ordinance of October 22, 1924, declaring part of petitioner's property a public hackstand, take petitioner's property without due process of law in violation of the Fourteenth Amendment?

2. Did Section 2 of the same ordinance forbidding private vehicles and taxicabs from parking on petitioner's property longer than a limited time take petitioner's property likewise in violation of the Fourteenth Amendment?

3. Did Section 3 of the same ordinance forbidding the use of part of petitioner's property for parking space for taxicabs take petitioner's property likewise in violation of the Fourteenth Amendment?

4. Did the contract of 1912 grant to the municipality the right to exclude the petitioner from use of its own land and to establish thereon a "public hack stand" against its express objection?

Reasons for the Petition.

The reasons for which this petition is presented are that the Circuit Court of Appeals has "decided a federal question in a way probably in conflict with applicable decisions of this Court" and that it has "decided an important question of general law in a way probably untenable or in conflict with the weight of authority" (Rule 35).

The decision of the Circuit Court of Appeals in this case is of far reaching importance. If it stands, it will be

determinative of the right of domain, use and regulation of all station yards purchased and held by common carriers of this country for the conduct of their business of transporting both passengers and freight. A matter of such importance should be settled by this Court.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit and submits its brief hereto attached in support of this petition.

Respectfully submitted,

JOHN W. DAVIS,
MAXIMILIAN M. STALLMAN.
JOHN L. SEAGER,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1926. No.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Petitioner,

VS.

THE TOWN OF MORRISTOWN, HENRY LADEN and others,

Respondents.

BRIEF IN SUPPORT.

POINT I.

The ordinance in question is repugnant to the Fourteenth Amendment of the Constitution of the United States because it takes petitioner's property without due process of law.

(*a*) THE ORDINANCE TAKES THE PROPERTY OF THE RAILROAD COMPANY WITHIN THE MEANING OF THE CONSTITUTION.

It is not necessary, in order to render the ordinance vulnerable to constitutional attack, that it must in terms or effect authorize an absolute conversion of property, so

long as it affects the free use and enjoyment of the property or the power of disposition at the will of the owner.

Pumpelly v. *Green Bay Co.*, 13 Wall. 166;
Ignacunias v. *Risley*, 98 N. J. L. 712;
Penna. Coal Co. v. *Mahon*, 260 U. S. 393, 413.

In *Great Northern R. R. Co.* v. *Minn.*, 238 U. S. 340, 345, Mr. Justice McReynolds, in speaking of an order of a state commission directing a common carrier to install cattle scales, said: "Manifestly if the order to install is complied with plaintiff's property will be taken."

So in the case at hand while the municipality has not in terms deprived petitioner of the title to its lands, in establishing the hack stand thereon it has deprived petitioner of the right to use the land according to its own plans, purposes and requirements.

It has not condemned the property affected, nor has it provided any compensation to the owner.

(*b*) THE PROPERTY OF A RAILROAD COMPANY CANNOT BE TAKEN OR APPROPRIATED, UNDER THE GUISE OF REGULATION, EXCEPT FOR A PURPOSE WITHIN THE STATUTORY DUTIES OF THE CARRIER.

In *Great Northern Railroad Company* v. *Minnesota*, 238 U. S. 340, the police power of the State to regulate common carriers was invoked as a justification for an order directing the railroad company to install a scale for the use of stock buyers. In that case Mr. Justice McReynolds wrote (p. 345):

> "Manifestly, if the order is enforced, plaintiff-in-error's property will be taken. Whether this would

be without due process of law depends upon the special circumstances. * * * A taking of railroad property under administrative regulation must be tested by considering whether * * * the taking was justified by the *public necessities which the carrier could lawfully be compelled to meet* * * *. *The business of a railroad is transportation, and to supply the public with conveniences not connected therewith is no part of its ordinary duty.* The obvious purpose of the challenged order was to enforce installation at Bertha of a scale like those at Eagle Bend and Hewitt * * * We think this was an arbitrary and unreasonable exercise of power * * * *The demands which may be made upon a carrier are limited by its duty,* and the record shows that the required structure has no direct relation thereto * * * *A railroad's possessions are subject to its public duty, but beyond this and within charter limits, like the owners of private property, it may control its own affairs"* (citing *Donovan* v. *Penna. Co.,* 199 U. S. 279). (Italics ours.)

Again in *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71, 72, Chief Justice White paraphrased the foregoing opinion in the following language:

"Coming to consider the contention of the railway that the order to put in the scales was repugnant to the 14th amendment, as a taking of its property without due process, since, as a carrier, no obligation rested upon it to put in the scales, it was pointed out that the test was whether the order was so arbitrary and unreasonable as to exceed the power of government, or was justified by the public necessities which the carrier could be lawfully compelled to meet. Holding that, as *the duty of the railway was confined to fur-*

nishing appliances for its business of transportation, and that a cattle scale was not of such character, it followed that the railway could not be compelled to supply them as a means for building up the business of trading in cattle, *however much the public might be benefited thereby.*" (Italics ours.)

From the foregoing cases it is clear that the land of a railroad company cannot be appropriated for a use or a service which the carrier is not obligated by law to provide, nor for furnishing an appliance not part of its business of transportation.

(*c*) TAXICAB SERVICE IS NO PART OF THE BUSINESS OF PETITIONER AND IT CANNOT BE COMPELLED TO FURNISH LAND FOR A PUBLIC HACK STAND UNDER THE GUISE OF AN EXERCISE OF THE POLICE POWER.

It is not claimed in this case that the petitioner is engaged in the operation of taxicabs or that it is under any legal duty to provide such a service. Such service is not included in its filed tariff or in the price of tickets. Nevertheless, the effect of the ordinance in question is to require the petitioner to furnish a specified area of land as a station for the parking of cabs and as a place of business for the hackmen, and this at the sacrifice of a contract arranging adequately for such service. Two classes of individuals are involved, the hackmen, and their patrons who are expected to arrive on the company's trains. As to the passengers, we submit that the petitioner is under no obligation, and cannot be placed under an obligation, to furnish a large area of valuable land for the parking of public taxicabs.

When the railroad company furnishes the passenger with a driveway, by means of which his favorite or selected cab driver can drive up to and depart from the station door or platform, it has done all that can be legally expected or demanded in the way of affording him a safe and convenient exit from its premises. To go further, and require the railroad company to provide storage space for a large number of taxicabs, a "public hack stand," is in direct conflict with the principles announced by this Court in *Great Northern Railway Company* v. *Minnesota* and *Id.* v. *Cahill* (*supra*).

As to the cab drivers, they have no right to make use of the company's premises, and such a right cannot be conferred upon them by a municipal ordinance.

In *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, this Court said (p. 286).

> "Much has been said in argument as to the functions and duties of railroad companies. Under the decisions of this court there can be no doubt as to the nature of those functions or duties * * * Necessarily the same principles apply in reference to the use of the company's station house and depot grounds; and they are held in the same right as are its roads, its locomotives and other property or appliances employed in the transportation of passengers and freight, and must be devoted primarily to public use *to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad.* (Italics ours.)
>
> It by no means follows, however, that the company may not establish such reasonable rules, in respect to the use of its property as public convenience

and its own interests may suggest * * * Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects.

But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves * * * It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or in part except upon the payment of compensation. In other words, it is entitled to the protection of the constitution, and in the precise manner in which protection is given * * * *For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes.* (Italics ours.)

It would seem to be clear that the Penna. Co. had the right * * * to erect and maintain a passenger station and depot buildings for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort and safety of passengers and the wants of shippers * * * A hackman, in nowise connected with the railroad company, cannot, of right

> and against the objections of the company go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers * * * The railroad company * * * had no contractual relations with the defendants and owed them as hackmen no duty to aid them in their special calling * * *."

In this regard, we can perceive no difference in the legal status of a station driveway and that of a station building. In *Donovan* v. *Pa. Co., supra,* the Court held that "the same principles apply in reference to the use of the company's station house and depot grounds." If one is "public" the other is likewise a public place, and if the police power of a municipality extends to establishing a public hack stand on a station driveway merely because that facility may be a public convenience, there could be no argument against an ordinance adopted on the same ground establishing a news stand, barber shop, restaurant or other convenience in a railroad station, or establishing a trolley loop and station on the railroad land, and compelling the railroad company to provide free space for strangers to operate those conveniences, and yet if the opinion below is sound, there is nothing in the Constitution that can stop a municipality in the exercise of the asserted police power from adopting ordinances to that effect.

In *Thompson's Express Co.* v. *Mount,* 91 N. J. Equity 497, the Court of Errors and Appeals, per Mr. Justice Swayze, said:

> "The question we have to decide is * * * whether the railroad company can give the complainant an exclusive right in a case where neither the com-

plainant nor any of the defendants have any right whatever, or, in other words, whether the railroad may select its own company in a case where it is under no public duty to serve all who come, and has express statutory authority to exclude all except travelers. * * * Reason clearly answers in favor of the exclusion * * * the authorities above cited justify the exclusion on the ground that even where a public duty exists, the right of the railroad company to make reasonable regulation involves the right to protect itself from the turmoil and danger involved in a competition between hackmen on the platform of a railroad station and the consequent liability of the railroad company to respond in damages to a passenger in case of injury * * * A different case might arise if the railroad were under a legal duty to allow hackmen to do business and ply their calling on railroad property. Our view has not only reason on its side but also the authority of the highest tribunal, which can pass upon the question of the equal protection of the laws."

The Court below seems to have disregarded the limitations upon the exercise of police power which we have hereinbefore discussed. It states in the prevailing opinion below (Record, p. 369):

"Whenever private property is devoted to public use, such as that of a common carrier, it ceases to be '*juris privati*' only, and is 'affected with a public interest.' It then becomes subject to public regulation and if in that regulation the enjoyment of some of its attributes are disturbed and the owner suffers injury, this does not deprive him of his property without due process of law, nor take it without just compensation, nor deny him the equal protection of law. It is either

damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing the general benefit which the regulations confer." *Munn* v. *Illinois,* 94 U. S. 113; *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* 248 U. S. 372; *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228.

The difficulty is that the cases cited deal exclusively with rates or with the regulation of those public services which the utility companies were obliged by law to furnish their patrons, and do not involve the use of land or the performance of duties foreign to their business. Nothing is said in any of them in support of taking land without paying for it, or in support of taking it and handing it over to individuals.

In *Wolff* v. *Court of Industrial Relations,* 262 U. S. 522, Chief Justice Taft, emphasizing this distinction between rate and other transportation service regulation and a general regulation of property, says (p. 539):

> "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner * * * It is not a matter of legislative discretion solely * * * To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. * * * This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention."

And referring particularly to *Munn* v. *Illinois,* the Court points out that what was regulated was the *owner's*

operation of the elevator, a business which *he had a right to discontinue when he chose.* "These words refute the view that public regulation in such cases can secure continuity of a business against the owner. * * * The power of a legislature to compel continuity in a business can only arise when the obligation of continued service by the owner * * * is direct, and is assumed when the business is entered upon."

As the effect of the ordinance is manifestly to establish a taxicab business, which the company has not assumed as an obligation, and to compel the railroad company to become a partner to the extent of furnishing the land essential thereto, for the "parking of cabs awaiting fares," but over which the railroad company is given no management and no return, and has not the power to discontinue at its will, the inapplicability of the Munn and similar cases to the question here, and the consequent conflict with the judgments of the Supreme Court, seems to us to be manifest.

Along the same line is the statement in the opinion below that the Railroad Company, in providing a driveway practically dedicated it to public use and regulation. This is in conflict with the decision in *Donovan* v. *Pennsylvania Co., supra,* and other cases in the Supreme Court.

As the railroad company is not required to furnish taxicab facilities, and no charge for such facilities is impliedly included in the rates of fare, and as no compensation is provided for the use of the land devoted to parking of taxicabs, the situation comes squarely within the

judgment of Mr. Justice Butler in *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413, where he said (420) that:

> "The commission, under the guise of regulation, may not compel the use and operation of the company's property for public convenience without just compensation."

Therefore, as the railroad company is under no duty to provide taxicab service, and as the ordinance in question deprives the owner of the use of its land and appropriates it to such alien service, there can be no question that this ordinance is exactly the sort of unauthorized action mentioned by Mr. Justice Holmes in *Penn. Coal Co.* v. *Mahon*, 260 U. S. 393, 415, where he said:

> "The protection of private property in the fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the fourteenth amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the constitution of the United States. * * * It is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. * * * **We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."**

The foregoing observation of an eminent jurist is distinctly at variance with the statement in *Ex parte Vance*, 62 S. W. 568, cited in the prevailing opinion in the Court below, that

> "it is presumed that the municipality which is entrusted with the safety and convenience of travelers is the best judge of the conditions and environment, and that it will not act in an unjust or oppressive manner, but for the good of the community."

(*d*) THE ORDINANCE CANNOT BE UPHELD AS SECURING THE PERFORMANCE OF A LEGAL DUTY OWING BY THE RAILROAD COMPANY TO ITS PASSENGERS—IN OTHER WORDS, AS A REGULATION OF TRANSPORTATION.

If the opinion of the Court below means that the land is subject to regulation because its owner is a common carrier, and that the ordinance must be regarded as securing the performance of a legal duty owing to the company's passengers—in other words, a regulation of transportation—we think the Court has overlooked the fact that it is not shown, or claimed, that the municipality is invested with such power by the legislature of the State. The Court must take judicial notice of the State statute (*Vagaszki* v. *Coal Co.*, 225 Fed. 913), which confers exclusive jurisdiction of the regulation of the services and property of a common carrier upon an administrative body, to wit, the Board of Public Utility Commissioners (P. L. New Jersey, 1911, Chap. 195).

> "Sec. I, 15. *The Board shall have general supervision and regulation of, jurisdiction and control over, all public utilities, and also over their property, prop-*

erty rights, equipment, facilities and franchises. * * * The term 'public utility' is hereby defined to include every * * * corporation * * * that now or hereafter may own, operate, manage or control within the State of New Jersey any steam railroad * * *" (Italics ours.)

We cannot assume that the Court intended to held that a municipality of New Jersey has jurisdiction and powers which the State has not granted to it, but which it has specifically conferred upon and vested in an agency of the legislature; but the intimation in the opinion that the ordinance is justified because the lands are those of a common carrier and therefore subject to municipal control seems to assume a legal fact in conflict with the State law.

POINT II.

The contract of September 24, 1912, cannot be construed as a grant of a public easement.

The pertinent provisions of the contract in question are as follows (Record, p. 315):

"The Railroad Companies shall also lay out, locate and construct a new driveway and station grounds approach extending northerly at right angles from Morris Street, between the Railroad Companies' proposed new passenger station grounds and the Railroad Companies' present freight house tracks, to the westerly side of their tracks as relocated, and extending thence under and across the said tracks and easterly at right angles therefrom to the easterly

and southerly lines of the lands of the Railroad Companies. * * * The Railroad Companies shall provide all lands necessary for the laying out and establishing said driveway. Said driveway shall be kept open at all times for passengers, pedestrians, carriages, wagons, automobiles and general vehicular traffic to and from the station grounds on the easterly side of said Railroad and for use of those now having rights of egress to Morris Street in Saw Mill Lane, **but this contract shall not be construed as a dedication of said driveway as a public highway.**"

"It is further agreed that the Town may and shall exercise all necessary police powers in and upon the station, station grounds, approaches and driveways, for the purpose of regulating foot and vehicular traffic at said station, and **for the enforcement of the rules and regulations of the Railroad Companies in respect thereto.**"

The petitioner relied in the District Court and in the Circuit Court of Appeals upon the clause in the contract reading:

> "This contract shall not be construed as a dedication of said driveway as a public highway."

As Judge Buffington states in his dissenting opinion, this is the covenant of the town as well as the railroad, and the municipality cannot, and the Courts should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets. *The majority opinion, however, does not mention or construe this clause,* and we sub-

mit that it is prejudicial error to fail to give effect to this plain language of the contract.

The other clause of the contract provides that the town shall exercise "all necessary police powers" at the station for the purpose of regulating traffic, and *for the enforcement of the rules and regulations of the railroad companies with respect thereto.*

The proofs show that for the purpose of protecting its passengers from the importunities of competing cabmen the railroad company attempted to regulate its station grounds by excluding all other cabmen from the premises and granting to one Welsh the exclusive privilege of conducting a taxicab business on its lands. This was the identical practice and regulation approved by this Court in *Donovan* v. *Pennsylvania Company,* 199 U. S. 279.

The petitioner contended in the courts below that the last-quoted clause of the contract meant what it says, that the town would "exercise all necessary police powers" for the enforcement of the rules and regulations of the railroad company in respect to traffic at the station; that is to say, the railroad company bargained for and obtained what it considered a means of protection to its passengers, its property and its operations. Manifestly there is nothing in the language employed to suggest that the railroad company intended to confer upon the town a right to regulate or use the station grounds in a manner directly contrary to its own desires and plans of operation, or to impair the effect of the preceding clause providing that the driveway should not be deemed a public way.

Conclusion.

The case presented is so concisely yet so completely stated by Judge Buffington in his dissenting opinion that we here print it in conclusion of our argument.

> "Under whatever form of words the matter may be stated, the simple fact is that the railroad's property has been taken from it without compensation and it is now denied possession of its own ground. In its agreement with the City it asserted its private ownership of this private road, so what has been now taken for public use, under the guise of public property, is in fact private property. Because the constitution forbids taking private property for public use without compensation, I record my dissent. What happened was that the railroad laid out and built a 'driveway and station ground approach'; it granted a public right of access to and from its station over such driveway in these words: 'Said driveway shall be kept open at all times for passengers, pedestrians * * * and general vehicular traffic to and from the station'; but far from surrendering its property and constituting it a public road, with all the incidents of municipal road control over municipal streets and highways, this contract with the municipality expressly stipulated—and it is the covenant of the municipality as well as the railroad—that 'this contract shall not be construed as a dedication of said driveway as a public highway.' In the face of this agreement the city cannot, and Court should not, really and in fact, make the *locus in quo* a public highway by exerting over it a municipal control which can only be exercised over public streets" (Record, p. 372).

For the reasons stated your petitioner respectfully prays that a writ of certiorari issue to enable this Court to review the decision of the Circuit Court of Appeals.

Respectfully submitted.

JOHN W. DAVIS,
MAXIMILIAN M. STALLMAN.
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